Parks, Recreation And Historic Preservation Law §§ 15.03(2), 15.09, 15.11, Article 15

Questions relating to circumstances under which logging on municipal parkland constitutes a non-park purpose.

July 13, 2012

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Formal Opinion
No. 2012-F1

Dear Mr. Alworth:

The Office of Parks, Recreation & Historic Preservation (OPRHP) assists municipalities in determining whether a proposed use of parkland is consistent with park purposes. In the context of providing such assistance, you have asked several questions relating to logging on municipal parkland. Once land has been dedicated as public parkland, legislative approval is required when there is a substantial intrusion on that land for non-park purposes. *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 630 (2001). Your questions relate to the circumstances under which logging on municipal parkland constitutes a non-park purpose.

You have presented the following facts:

A municipality wants to establish a forest management plan that would allow stands of mature timber in municipally-owned parkland to be harvested using best management practices, including forest stewardship guidelines established by the Department of Environmental Conservation. One of the goals of the forest management plan would be to enhance the health of the forest and bolster its ability to fight infestations of invasive insects. Certain areas of the park that are currently used for passive recreation such as hiking would be marked, and bids for logging would be solicited. Logging roads would be cut, the timber would be removed, and the money garnered from logging would be used to enhance the parks in the municipal system. Once logging is complete, the roads used to remove timber would allow park users greater access to wildlife and permit additional types of recreation such as horseback riding and snowmobiling.

1. You have asked whether particular factors or standards should be used to determine whether proposed logging constitutes commercial timber harvesting -- and

thus a non-park purpose, Op. Att'y Gen. (Inf.) No. 95-52 -- or execution of best forest management practices to preserve parkland and the subsequent sale of resulting wood, which we have concluded previously is permissible without legislative approval, Op. Att'y Gen. (Inf.) No. 2000-3; *see also* 1962 Op. Att'y Gen. (Inf.) 250 (growing crops that are easily removed from recently-acquired park property should not be wasted if a willing buyer can be found).

We believe that the fundamental question to be considered when determining whether legislative approval is necessary for logging on municipal parkland is whether the purpose of the logging is a park purpose. A proper park purpose is one that "contribute[s] to the use and enjoyment" of the park and facilitates "public means of pleasure, recreation and amusement." *Williams v. Gallatin*, 229 N.Y. 248, 254 (1920). Thus, if the purpose of removing trees is to enhance or improve the experience of park users, then the cutting and subsequent sale of harvested wood,[1] we believe, is not a prohibited diversion of parkland to non-park use. Legislative approval is not required, even if an individual or private entity incidentally derives profit from it. We analogize this situation to the establishment of restaurants or food concessions on parkland, which, if designed to serve park patrons, is a permissible use of parkland, despite the incidental benefit to the owner or operator of the eating establishment. *795 Fifth Ave. Corp. v. City of New York*, 15 N.Y.2d 221 (1965); *Williams v. Hylan*, 126 Misc. 807, 812 (Sup. Ct. N.Y. Co. 1926).

If, however, the logging project is for some purpose other than enhancement of park use, and a park purpose is only incidentally served by logging, then such removal would constitute a diversion of dedicated parkland for non-park purposes, and authorizing legislation should be sought. *Williams v. Hylan*, 223 A.D. 48 (1st Dep't 1928) (lease to private vendor primarily served vendor's interest and was prohibited alienation). This is true even if the purpose to be served by the logging project is another public purpose, however worthy. *Friends of Van Cortlandt Park*, 95 N.Y.2d 623, 631-32 (water treatment plant); *Williams v. Gallatin*, 229 N.Y.248, 253 (1920) (courts or schools); *Matter of Central Parkway*, 140 Misc. 727 (Sup. Ct. Sch'dy Co. 1931) (highway).

Whether the municipality's purpose in engaging in a logging project is to enhance park use depends on the particular facts of a logging proposal. Several questions that might be relevant to such a determination include the following:

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[1] We assume that the local government has determined that removal of the felled trees from the park will serve park use better than leaving the cut trees, for example, to provide wildlife habitat. *See* Cornell Cooperative Extension and New York State Department of Environmental Conservation, "Enhancing Wildlife Habitat," *available at* http://www2.dnr.cornell.edu/ext/info/pubs/FCfactsheets/FCFSEnhancingWildlifeHabitat.pdf.

- What goal will motivate the selection of the trees to be cut?[2]
- Does the person or entity selecting them have an interest in maximizing timber yield?[3]
- Is the public being compensated at a fair price for the timber?[4]
- How will the location of roads be determined?
- Does the municipality plan to add other facilities to encourage additional recreational uses after logging is complete?
- Would the municipality pursue the logging project if the wood could not be sold?

2. You have asked whether the fact that some of the proceeds from the sale of harvested wood will be used to support park operations in the municipality is relevant to determining whether parkland is being alienated or diverted to a non-park use. We are of the opinion that it is not.

As an initial matter, we continue to believe that cutting trees from a park for the purpose of financial profit would be using the parkland for a non-park purpose, production of a cash crop. *See* Op. Att'y Gen. (Inf.) No. 95-52. Logging under these circumstances would not be for the purpose of enhancing the experience of users of the park. Using the funds to support municipal park operations would not subsequently convert the non-park purpose into a purpose where enjoyment of the park was foremost. "The parks are not intended primarily as sources of revenue, and an illegal use of them will not become legal because some revenue is derived from the use." *Tompkins v. Pallas*, 47 Misc. 309, 95 N.Y.S. 875, 877 (Sup. Ct. N.Y. Co. 1905); *see also Johnson v. Town of Brookhaven*, 230 A.D.2d 774, 774-75 (2d Dep't 1996) (long-term lease to private corporation, revenue from which would finance restoration of parkland, non-park use).

When timber, having been cut for a park purpose, is sold, we believe that, absent legislation authorizing otherwise, the proceeds from such sale should be reinvested in the park from which the timber was cut. Op. Att'y Gen. (Inf.) No. 2000-3; *see also* 1962 Op. Att'y Gen. (Inf.) 250 at 251 (proceeds of sale of structures removed from parkland

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[2] The Department of Environmental Conservation notes that the goals of a forest management plan influence choices about management techniques; for example, the trees chosen for wildlife habitat or aesthetic purposes might differ from those selected for timber production. "Timber Harvesting," *available at* http://www.dec.ny.gov/lands/5242.html; *see also* Op. Att'y Gen. (Inf.) No. 95-52 (recognizing that the basis for selecting trees for commercial harvesting is solely economic yield).

[3] You have advised that in one proposal, the forest management plan will be created by a consultant who will be paid in part with a percentage of the proceeds of any harvested timber. This suggests that the consultant's interest may diverge from that of the public's in use of the park.

[4] *See Williams v. Hylan*, 126 Misc. 807, 813 (Sup. Ct. N.Y. Co. 1926) (adequacy of consideration is pertinent to question of whether arrangement is primarily intended to advance private financial interests or promote public good).

should be reserved for park improvements). Such reinvestment supports the local government's claim that the logging was not done to raise funds for a non-park use. Further, it retains park resources for the benefit of the users of that park. Reinvestment of timber proceeds in the park from which the logs were cut thus may prevent challenges to the logging project from those most affected by it.

3. You have asked whether the fact that a municipality has received State grant funding for the park should be used as a determinative factor in analyzing whether the proposal is an alienation that requires legislative approval. Article 15 of the Parks, Recreation and Historic Preservation Law (PRHPL) provides for the allocation of moneys received by the State from the sale of bonds pursuant to two park acquisition bond acts. Under the authority of article 15, the State may provide grants to local governments for the acquisition of parkland. PRHPL § 15.03(2). Parklands purchased with such bond funds "shall be retained by the municipality and shall not be disposed of or . . . used for other than public park and related purposes" without express legislative approval.[5] PRHPL § 15.09. The question you have asked is whether this statute creates a standard for determining whether parkland is alienated that differs from that applied under the common law doctrine.

We are of the opinion that the standard for determining whether a proposal for logging will involve an alienation or diversion from park purposes is the same under section 15.09 and the common law. Section 15.09 codifies the principle of inalienability from the common law public trust doctrine with respect to land purchased with these bond moneys. It differs from the common law doctrine by eliminating the need to ask an initial question that arises when applying the common law doctrine, that is, whether the land was dedicated as parkland. *See Powell v. City of New York*, 85 A.D.3d 429, 431 (1st Dep't 2011) (no dedication); *Riverview Partners v. City of Peekskill,* 273 A.D.2d 455, 455-56 (2d Dep't 2000) (dedication by implication). But the statute establishes the same test for alienation or diversion as is applied under the common law doctrine: is the land being alienated ("disposed of") or diverted from ("used for other than") park purposes. *See* Op. Att'y Gen. (Inf.) No. 95-52 (even if section 15.09 did not apply, common law restriction would apply if land was dedicated; whether land was dedicated depends on particular facts).

Very truly yours,

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[5] The statute includes one exception from the requirement that such parkland be used for park purposes: section 15.11 authorizes the temporary continued use by former owners.